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Supreme Court of the United States

OCTOBER TERM, 1963

No. 832

STAFANOS KTISTAKIS,

Petitioner,

vs.

UNITED CROSS NAVIGATION CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT UNITED CROSS NAVIGATION CORP.

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The Opinions Below

The initial opinion of the District Court for the Southern District of New York is reported at 204 F. Supp. 293.

The opinion of the United States Court of Appeals for the Second Circuit affirming, reversing and remanding, in part is reported at 316 F. 2nd 869.

The opinion of the District Court on remand is not officially reported but is reprinted in Appendix A attached hereto.

The opinion of the Court of Appeals affirming the District Court's decision on remand is reported at 324 F. 2nd 728.

Jurisdiction

The judgment of the Court of Appeals was entered on November 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions for Review

Respondent objects to the Petitioner's analysis as to the four (4) questions involved herein in that the record and opinions below do not present the issues suggested by the Petitioner.

Statement

In November, 1957, the Petitioner, a Greek citizen, was serving as second mate aboard the SS GENIE, a tank vessel owned and operated by Respondent, United Cross Navigation Corp., a Liberian corporation. During his watch he allegedly slipped on an oil spill, fell and was injured as he walked under the discharging lines as the Vessel pumped her cargo into the Socony Terminal at Staten Island, New York. It was stipulated that the Liberian law as to unseaworthiness was the same as the General Maritime Law of the United States and this was the basis of the jurisdiction below and not the Jones Act, 46 U.S.C.A. 688, as contended by the Petitioner.

The District Court awarded Petitioner $80,000.00 but reduced this amount by 50% for Petitioner's contributory negligence in not discovering and correcting the unseaworthy condition.

Initial Decision of the District Court

The Trial Judge found that even though large tubs had been placed under the flanges of the discharge lines still there were drippings on the deck which had been covered with sawdust, a condition which existed for at least 2½ hours during Petitioner's watch prior to his injury. The Petitioner, as the supervisor of the watch, said the Court, not only had the duty to detect the presence of the oil but also to have it removed. Since he did neither his contributory negligence was 50% responsible for his accident and resulting injuries.

Initial Decision of the Court of Appeals

The Court of Appeals found that the District Court should have judged Petitioner's contributory negligence by the traditional yardstick of the reasonably prudent man under the circumstances. The case was remanded for determination of whether the Petitioner was contributorily negligent and if so, to what degree, using the aforementioned standard.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

Decision of the District Court on Remand .

The District Court in its opinion reviewed the evidence once again and, summarily stated, made the following consistent findings:

1. That the Petitioner admitted making a periodic inspection of the deck during the 2½ hours period prior to his accident and in particular the areas where the discharge was taking place and the accident occurred.

2. That at the time the Petitioner fell, he "was in a hurry" and there were indications in the record that he saw the oil and sawdust prior to his "slip."

3. That Petitioner admitted that if the tubs under the flanges became filled with oil, he would order them to be emptied by the seamen and if any oil was spilled, the seamen were directed to clean up the spillage and/or sawdust. This was a part Petitioner's duties as the supervisor of the watch.

4. That the accident occurred in an open and well lighted area under Petitioner's supervision.

The Court concluded that a reasonably prudent man would have discovered the condition to which Petitioner admitted and his failure to do so was 50% responsible for his accident.

Second Decision of the Court of Appeals

The Court of Appeals in affirming the District Court found that the Trial Judge had followed their instructions and had applied the correct standard. In so doing the Court said:

> "After remand plaintiff moved for summary judgment and a redetermination of the damages on the trial record. Obedient to our instructions, the judge reviewed the record, and applied the standard we instructed him to apply. In a memorandum opinion he reaffirmed his previous estimate of the extent to which plaintiff's own negligence had contributed to the injury, and he reaffirmed his former award of damages. Plaintiff appealed. We affirm. Oil had been dripping for several hours from the coupling where the shore discharge lines and spill tubs had been placed under the leaking coupling to catch the drip. The entire area was well lighted. From midnight until 2:30 A.M. plaintiff had been responsible for the supervision of the work being done in this area, including the emptying of the spill tubs from time to time. The slippery condition caused by the oil that had dripped onto the deck from the coupling or the tubs should have been apparent to a reasonably prudent man in the plaintiff's position." (Petition, App. A, P. 16, 17)

ARGUMENT

1. The record and opinions below do not present the questions posed by petitioner.

The record and opinions below do not present the four questions posed by Petitioner.

The first two questions raise the issue of whether an action for unseaworthiness, ex contractu in nature, prohibits the application of tort concepts of contributory negligence and assumption of risk.

These questions were not raised, briefed or argued below. They should not be allowed to be presented at this time. Cf. *California* vs. *Taylor*, 353 U.S. 553, 556, n2.

The third and fourth questions inquire whether a ship's watch officer's failure to discover an unknown unseaworthy condition constitutes negligence on his part. If the answer is in the affirmative, then the issue is whether his award is subject to reduction by reason thereof.

The third question was favorably decided for Petitioner on the first appeal. The Petitioner contended that the district court judged the Petitioner's conduct on an improper standard. The district court had held that Petitioner was under a duty to inspect and discover the oil spill and keep the deck clean and his failure to do so was contributory negligence. The Court of Appeals disagreed and remanded the case with instructions to examine Petitioner's conduct.

"By the traditional negligence standard of

whether he exercised the care which a reasonably prudent man would have exercised under the circumstances." Petition, Appendix A, P. 16)

As to the fourth question the district court on remand made a factual finding as to the slippery condition of the deck and held that the Petitioner's conduct did not measure up to the standard of a reasonably prudent man in Petitioner's position in the circumstances. There was no fact finding that the slippery deck was a latent unseaworthy condition but on the contrary, that the slippery deck was patent and that the entire area was well lighted. Knowledge with respect to negligence not only includes actual knowledge but constructive knowledge. The finding is one of fact in all the circumstances. The Petitioner does not contend that the findings of the Court are clearly erroneous. *McAllister* vs. *United States*, 348 U.S. 19 (1954).

2. An action for unseaworthiness does not arise ex contractu.

Assuming that questions one and two are timely it is submitted that they are based upon a false premise in that a personal injury action for unseaworthiness is not ex contractu.

Petitioner misconceives the nature of an action for the breach of the warranty of seaworthiness. In *Seas Shipping Company Inc.* vs. *Sieracki*, 328 U.S. 85 (1946) the Court extensively investigated the source, nature and extent of the warranty of seaworthiness (P. 94-95):

"It is essentially a species of liability without

> fault, analogous to other well known instances of our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *Mahnich* vs. *Southern S.S. Co.*, 321 U.S. 96, 88 L.ed 561, 64 S. Ct. 455, supra; *Atlantic Transport Co.* vs. *Imbrovek*, 234 U.S. 52, 58 L ed 1208, 34 S. Ct. 733, 51 LRA(NS) 1157; *Carlisle Packing Co.* vs. *Sandanger*, 259 U.S. 255, 66 L. ed 927, 42 S. Ct. 475, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

The foregoing language was quoted with approval in *Mitchell* vs. *Trawler Racer Inc.*, 362 U.S. 539, 549 (1963). In *Reed* vs. *Yaka*, 373 U.S. 448 (1963) this Court stated (P. 451):

> "In *Seas Shipping Co.* vs. *Sieracki*, 328 U.S. 85, 90 L ed 1099, 66 S. Ct. 872 (1946), we held that a shipowner's warranty of seaworthiness extended to a longshoreman injured while loading the ship, even though the longshoreman was employed by an independent contractor. In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. 328 U.S. at 93-95."

3. It is well established in admiralty that contributory negligence is simply the doctrine of comparative negligence and that assumption of risk must be applied in harmony with it.

In the Courts below the issue of assumption of risk was not raised by the Petitioner. The only concern was the standard of care by which Petitioner's conduct should be judged. The Appellate Court held that Petitioner's conduct should be judged by the standard of a "reasonable man." Conduct falling short of that of a reasonable man was deemed by the Court to be contributory negligence upon a factual finding and in mitigation of rather than a bar to Petitioner's claim.

Historically under the General Maritime Law, before the Jones Act, 46 U.S.C.A. 688, assumption of risk and contributory negligence were not a complete defense to an action for unseaworthiness. Contributory negligence was a partial defense, a ground for mitigation of damages. *The Arizona* vs. *Anelich*, 298 U.S. 110, 122 (1936); *Beadle* vs. *Spencer*, 298 U.S. 124, 131 (1936).

In *Socony-Vacuum Oil Co.* vs. *Smith*, 305 U.S. 424, 431 (1939) the Court stated:

> "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence,

however gross, is not a bar to recovery but only mitigates damages."

* * *

"We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury."

Petitioner contends that a ship's officer is not negligent if he fails to correct an unseaworthy condition unknown to him. Petitioner misconceives the holdings of the Courts below. There are two facets to contributory negligence with respect to knowledge, actual and constructive. It was found, as a matter of fact and conclusion of law based thereon, that the Petitioner knew or should have known of the oily condition of the deck and that his conduct was not that of a reasonable prudent man.

4. The rule of comparative negligence is a partial defense unlimited by the status of the claimant, his relationship to the party sued or the nature of the action.

The comparative negligence rule has been applied in maritime personal injury cases against seamen, longshoremen, carpenters and shoreside workers regardless of contract and regardless of whether or not the claim against the vessel was based on negligence or unseaworthiness.

Pope & Talbot, Inc. vs. *Hawn*, 346 U.S. 406 (1953).

The Steamer Max Morris vs. *Curry*, 137 U.S. 1.

Wood vs. *U.S.*, 125 F. Supp. 42, 53 (S.D.N.Y. 1954).

Efstratios Karanikolas vs. *Navegacion Maritime Pan.*, 157 F. Supp. 602, 605 (S.D.N.Y. 1958).

Jacob vs. *New York*, 315 U.S. 752, 755.

Bentley vs. *Albatross S.S. Co.*, 203 F. 270 (3 C.A. 1953).

Ahlgren vs. *Red Star Towing & Transp. Co. Inc.*, 214 F. 2d 618 (2 C.A. 1954).

John A. Roebling's Sons Co. of New York vs. *Erickson*, 261 F. 986 (2 C.C.A. 1916).

Unseaworthiness and Jones Act, 46 U.S.C.A. 688, negligence remedies are cumulative. They arise out of the same injury and must be joined in a single proceeding. *McAllister* vs. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958). A judgment for unseaworthiness is

a complete bar to a subsequent action for the same injuries under the Jones Act. *Baltimore Steamship Company* vs. *Phillips*, 274 U.S. 316 (1927). Shoreside workers unseaworthy and negligence remedies are cumulative. It would be incongruous and violate harmony and uniformity in the maritime law if the rule of comparative negligence were denied as a partial defense in an action for unseaworthiness and allowed as a statutory partial defense under the Jones Act and an action for maritime negligence. In effect the Jones Act would be repealed. There are comparatively few conceivable situations where an action under the Jones Act would be brought instead of an action for unseaworthiness, but if such suits were continued to be joined a charge to a jury of contributory negligence solely in a Jones Act suit would be meaningless and could not effect the end result of full damages without diminution in the unseaworthy suit. A seaman or shore worker could recover full damages for the rankest kind of gross negligence and a reckless disregard for his own safety. Cf. *Socony-Vacuum Oil Co.* vs. *Smith*, 305 U.S. 424, 431 (1939).

There is no necessity for the Court to go so far as to abolish the comparative negligence rule in unseaworthy actions. The effect would be to virtually make the shipowner an insurer without the seamen or maritime shore workers absorbing any portion of their injuries whatever their fault may be.

5. The decisions below are clearly correct.

The sole question before the Court on the first appeal was whether or not the District Court applied the proper standard in judging the Petitioner's conduct. The Trial Court judged Petitioner's conduct on the basis of a duty imposed upon Petitioner to inspect and discover the oil spill. The district Judge equated the breach of that duty to contributory negligence. Upon remand the district Judge was instructed to re-examine the Petitioner's conduct on the standard of a "reasonable prudent man." He applied the required standard and again found Petitioner guilty of contributory negligence. The Judgment was affirmed on Appeal.

The district Judge made a finding of fact and on the factual determination applied the reasonable man rule. Petitioner does not contend that the finding of fact was clearly erroneous or that the Court failed to apply the proper standard of care to Petitioner. The contention is that the facts as found did not amount to contributory negligence as a matter of law in that the unseaworthiness was unknown to Petitioner. It is further argued the partial defense of contributory negligence is not available in ex contractu causes of action, an action for the breach of warranty of seaworthiness.

The argument of Petitioner on the second appeal was that the trial Court did not follow the instructions of the Circuit Court but rendered the same opinion a second time in almost the same language. The

Appellate Court disagreed with Petitioner's contentions for reasons heretofore set forth.

The factual and legal determination of the Petitioner's conduct judged by the standard of a reasonably prudent man is binding upon the Petitioner upon his application for the Writ of Certiorari.

6. There is no conflict in the decisions.

None of the cases cited by the Petitioner present a conflict in the decisions between circuits or within any one circuit.

In *Dixon* vs. *United States*, 219 F. 2d 10 (2 C.A. 1955) there was a factual determination by the trial judge that the Plaintiff was not guilty of contributory negligence. That finding was not disturbed on appeal. The case was remanded from the Circuit Court to the Trial Court for further proceedings with respect to the determination of the proximate cause of Plaintiff's accident.

In *Becker* vs. *Waterman S.S. Corporation*, 179 F. 2d 713 (2 C.A. 1950) the jury determined that the Plaintiff was not guilty of contributory negligence. He had not seen a blob of oil on which he slipped. The Court stated (P. 713):

> "There is no substantial dispute as to the facts which the jury could have found from the evidence."

The shipowner contended in the *Becker* case the Plaintiff, the chief officer, could not recover because

he was under a duty to correct a dangerous condition of which he had knowledge and sustained his injuries by reason of the very condition he was employed to correct. The Court rejected the argument and stated that (P. 715):

> "If the Plaintiff was also negligent in failing to see the blob of oil on which he slipped, his own negligence may reduce the amount of his recovery but is not a bar to his action."

There was also a finding that the assistant engineer's negligence contributed to the accident.

In *Stokes* vs. *United States*, 144 F. 2d 82 (2 C.A. 1944) the Court held (P. 87):

> "Accordingly, we think that the findings of fact and inferences on which the trial judge based his conclusion that libellant was guilty of negligence was clearly erroneous."

In *Hildebrand* vs. *United States*, 226 F. 2d 215 (2 C.A. 1955) the Court in affirming the District Court stated (P. 216):

> "The findings which respondent attacks are not clearly erroneous."

The District Court 134 F. Supp. 514 (SDNY 1954) found that the mate was not guilty of contributory negligence in using a ladder with two rungs missing where the mate had knowledge of that condition. The Court stated (P. 518):

> "I do not believe that it can be assumed that because two rungs are missing from a ladder, that it is negligent to use the balance of the ladder.

particularly when the ladder had been in use and continued to be in use up to the time of the accident. I therefore conclude that the injuries received by the libelant were not contributed to by any negligence on the part of libelant."

In *Socony-Vacuum Oil Co.* vs. *Smith*, 305 U.S. 424, the Court held that assumption of risk was not a defense to a seaman's action, but it should be construed in harmony with the partial defense of contributory negligence, a doctrine of comparative negligence.

Thus, in all of the foregoing cases the Courts in the factual context of each case applied the standard of a reasonable prudent man and made a factual determination as to whether the seaman's conduct was equal or fell short of such standard. In no case did the Court hold that assumption of risk was recognized in admiralty as a complete defense to the seaman's action.

Respondent does not disagree with the remaining cases cited by Petitioner insofar as they recognize and apply the principle that knowledge will not be imputed as a matter of law to one who fails to look for danger, which, under the prevailing circumstances and conditions he had no reason to apprehend or anticipate. This principle of law is encompassed in the standard of conduct of a reasonable prudent man and his knowledge, actual or constructive, of prevailing circumstances and conditions he had reason to apprehend or anticipate.

The cases cited by Petitioner with reference to the doctrine of maintenance and cure and the contractual obligation of a stevedore, an independent contractor,

to a shipowner are not in point. They involve considerations and policy unrelated to the obligation of a shipowner to a seaman under the doctrine of seaworthiness and the duty of the seaman to exercise reasonable care for his own safety.

Whatever may be the principle and the effect of cases, decided under the Fifth Amendment of the U. S. Constitution, they have no application in this case. Petitioner has made no showing that the decision of the Court in this case has denied Petitioner equal protection before the law or by reason of any conflicting decisions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Opinion of Bonsal, *D. J.*, on Remand (June 17, 1963)

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BONSAL, D. J.

MEMORANDUM

Plaintiff sued under the general maritime law for personal injuries received while aboard the defendant's vessel, the S.S. GENIE. Judgment was rendered for the plaintiff by this Court, sitting without a jury, in which the Court found the plaintiff 50 per cent contributorily negligent and awarded him damages of $40,000. 204 F. Supp. 293 (S. D. N. Y. April 13, 1962). Plaintiff's right to recover was affirmed by the Court of Appeals for the Second Circuit, but the Court held that an improper standard had been applied in determining plaintiff's contributory negligence (Docket No. 27843, May 7, 1963). Therefore, the case was "remanded to the District Court for a

new determination, made in light of the proper standard, of whether plaintiff was contributorily negligent" (slipsheet, at 1994).

Plaintiff has now moved for summary judgment and a redetermination of the damages on the basis of the opinion of the Court of Appeals and the record of the trial. Oral argument has been had, and the Court has carefully reviewed the trial record in the light of the decision of the Court of Appeals.

The accident in question occurred in November 1957. At that time the plaintiff had been a seaman for approximately 32 years and a second mate aboard the tanker GENIE for two years. This Court found that the unseaworthy condition which caused the accident had been present for some time.

> "However, if we accept the plaintiff's testimony that no oil was spilled and sawdust spread over it during his watch, it is clear that at 2:30 A.M. when the plaintiff slipped and fell, the unseaworthy condition was not one of a 'mere momentary' nature. If there was oil on the deck covered with sawdust at 2:30 A.M., and no oil was spilled or sawdust spread from midnight on, it is reasonable to believe that the condition existed prior to midnight." 204 F. Supp. at 295.

It was conceded at the trial that the area in which the accident occurred was properly lighted.

Plaintiff stated that as mate in charge of the watch he would periodically inspect the ship, particularly the areas in which oil was being taken on or dis-

charged. He testified that if the tubs placed under the connecting lines should become full or if there were sawdust on the deck, he would instruct the seamen under him to empty the tubs or clean up the sawdust. Plaintiff testified that when he came on watch at midnight the ship was still discharging oil and that during his watch when the injury occurred he was supervising the discharge.

At the time of his accident plaintiff was passing under the discharge lines which were four to five feet above the deck. The accident occurred in the center of the deck approximately fifteen feet from the rail. Plaintiff testified he was in a hurry when he fell about one to two feet away from the tub which was under the connection between the ship's discharge line and the shore line.

There was an indication at the trial that the plaintiff saw the oil and sawdust just prior to the time he slipped upon it. However, it is clear that, even if the plaintiff did not have actual notice of the unseaworthy condition, he certainly had constructive notice. Here was a condition which had existed for several hours in a well-lighted open place within the area of inspection of plaintiff's watch. No one in plaintiff's position exercising "the care which a reasonably prudent man would have exercised under the circumstances" (at 1994, slipsheet) could have failed to be warned of the unseaworthy condition.

Therefore, applying the mandate of the Court of Appeals to judge the plaintiff's conduct "by the traditional negligence standard" stated above, the Court

finds that the plaintiff was contributorily negligent and that this contributory negligence was 50 per cent responsible for the accident in which the plaintiff received his injuries.

Judgment will be entered for the plaintiff in the amount of $40,000.

So Ordered.

Dated: New York, N. Y.
June 17, 1963.

/s/ DUDLEY B. BONSAL
U.S.D.J.